Anti-Monopoly Compliance System: New Law, New System

Doniyor Abduazizov

Tashkent State University of Law
Teacher of the Department of Business Law

ABSTRACT

Indeed, the new "Competition Law" includes various new institutions, and the main topic of this article is the analysis of the antimonopoly compliance system. Antimonopoly compliance is a new legal system in competition policy, according to Article 9 of the Law 2023 "On Competition" the system encourages "to ensure the compliance of activity with the legislation on competition, to identify the risk of violations and to prevent them a system of internal organizational measures and measures aimed at". The basis of this system is the Decree No. 6019 of July 6, 2020 of the President of the Republic of Uzbekistan "On additional measures to further develop the competitive environment and reduce state participation in the economy" and the Resolution of the Cabinet of Ministers "On measures to introduce the anti-monopoly compliance system" was developed in accordance with the decision No. 114 dated March 2, 2021.

Keywords: *competition law, anti-monopoly compliance, authorized person, state bodies, large enterprises, associations of legal entities etc.*

As a result of the development of Uzbekistan's economy and the reduction of state intervention in the economy, competition law, which is considered the driver of the economy, is improving. As a result of this, the recently adopted new version of the Law "On Competition" can be an obvious example of such a progress in Uzbekistan. Husain Radjabov[1] lists the following positive news in the law:

1. The system of anti-monopoly compliance is being mandatorily introduced in state bodies, large enterprises and associations of legal entities;
2. The recognition of a superior position market share was reduced from 50% to 40% and its new criteria were introduced;
3. Subjects of natural monopoly have also introduced the ranks of subjects with a dominant position;
4. The institution of superior bargaining position is introduced. According to it, cases of abuse by business entities that do not have a dominant position, but are considered a strong party in contractual relations, can also be regulated (Japan's experience is an example);
5. In addition to cartel agreements, "coordinated actions without mutual agreement" are also defined as anti-competitive actions. According to it, in certain cases, parallel conducts that were not agreed upon by business entities in advance, but without any external influence or economic reasons, can also be considered as an action that restrict competition;
6. Cases related to violation of intellectual property rights have been excluded from the content of unfair competition;

[1] The Head of the Business Law Department of Tashkent State University of Law.

7. When providing state aid, it is mandatory to carry out a legal examination on the assessment of its impact on the competitive environment. According to it, tax and customs privileges, subsidies, grants, state guarantees, preferential loans, exclusive rights, sale and lease of state property at preferential prices, the right to use land resources and underground resources on preferential terms, and other preferences and advantages are granted to state economic entities. The draft normative legal documents providing for the provision of state aid are now sent to the Competition Committee for an opinion, and it is determined that the review of the opinion will also be mandatory.

Antimonopoly compliance system - the legal foundation

Indeed, the new "Competition Law" includes various new institutions, and the main topic of this article is the analysis of the antimonopoly compliance system. Antimonopoly compliance is a new system of internal measures in the competition policy, which, according to Article 9 of the Law on Competition, "ensures the compliance of activity with the legislation on competition, identifies the risk of violations and a system of internal organizational measures and procedures aimed at their prevention". The basis of this system is the Decree No. 6019 of July 6, 2020 of the President of the Republic of Uzbekistan "On additional measures to further develop the competitive environment and reduce state participation in the economy" and the Resolution of the Cabinet of Ministers "On Monopoly on measures to implement the anti-compliance system" was developed in accordance with Resolution No. 114 dated March 2, 2021 (hereinafter the Resolution).

Purpose, tasks and scope of the system

Purpose

Ensuring the implementation of the Decree of the President of the Republic of Uzbekistan No. 6019 dated July 6, 2020 "On additional measures to further develop the competitive environment and reduce state participation in the economy", as well as competition the Resolution of the Cabinet of Ministers was issued in order to prevent the risk of violation of the requirements of the law and to establish an effective system for the introduction of corporate standards of business conduct.

Main tasks

The Resolution of the Cabinet of Ministers "On measures to introduce the anti-monopoly compliance system" defines the following main tasks and stages of the anti-monopoly compliance system:

a) the anti-monopoly compliance system includes internal organizational measures and practices aimed at ensuring compliance of activities with the legislation on competition, identifying the risk of violations and preventing them;

b) the following are the main tasks of the antimonopoly compliance system:

- identification and assessment of possible risks of violation of the requirements of competition legislation and its management;
- ensuring and monitoring the compliance of the activities of state administration bodies, local executive authorities and economic entities with the requirements of the legislative documents on competition;
- prevention of violations of the requirements of the legislative documents on competition in the activities of state administration bodies, local executive authorities and business entities, as well as anti-competitive behavior by their leaders in the course of performing their duties;
- evaluating and ensuring the effectiveness of the antimonopoly compliance system in state administration bodies, local executive authorities and business entities;
- competition by training employees of state administration bodies, local executive authorities and business entities to prevent violations of the requirements of competition legislation and to regularly improve their skills in this direction to develop opinions on legislative documents.

Double phase trials

Antimonopoly compliance with the Resolution of the Cabinet of Ministers is tested at various stages, in particular:

- From **January 1, 2021**, as an experiment (trial), in state administration bodies, local executive authorities, and state-owned enterprises included in the list approved by Appendix 5 to the Resolution;
- From **January 1, 2022**, natural monopoly entities, economic entities with a dominant position in the goods or financial market, as well as corporate customers whose average annual total revenue from the sale of goods in the last three years exceeds 30 billion soums be accepted for information.

To date, the anti-monopoly compliance system was introduced in 104 enterprises and organizations, including 10 enterprises with state participation, 37 monopoly enterprises, 33 local executive authorities, 22 state management authorities, and 2 corporate customers.[2]

Organization of anti-monopoly compliance system

The system is established and maintained by various departments and authorized persons in organizations and enterprises at different levels. In particular:

- An authorized person (department) is appointed in accordance with the organizational structure, the number of employees and the nature of the activity in order to introduce the anti-monopoly compliance system in **state administration bodies, local executive authorities and economic entities**;
- Implementation of the antimonopoly compliance system in **economic entities,** ensuring its operation and monitoring can be entrusted to the internal audit service.
- Organization of the anti-monopoly compliance system in **state administration bodies, local executive authorities and business entities** and evaluation of its performance is carried out by the head of state administration bodies. Organization of the anti-monopoly compliance system in **local executive authorities** carried out by the mayor. The executive body or supervisory board organize anti-monopoly compliance system in **business entities**.

Foreign experience

Antitrust compliance is a policy of risk management and compliance in the corporate governance system, which is systematically organized in many foreign countries. In this article, I analyzed the experience of the member countries of the Organization for Economic Cooperation and Development (OECD) as a foreign experience.

In particular, the French Competition Authority in 2021 assisted to produce compliance guidelines for professional organizations to identify competition risks in their activities, explaining the scope of applicable sanctions, as well as taking into account their pro-competition functions, including the implementation of competition rules and increasing the number of members.[3]

One of the unique features of the international experience is the mechanism of organization of the compliance system. The experience of many OECD countries is based on different theories. The main difference is, in particular, when a violation of the law is detected, declarations are made to reduce fines or provide other benefits when the detected violation of the law is effectively resolved. According to OECD research, the trend has developed as follows in 10 years:

	2011	**2021**
Credit-granting states	Australia, Denmark, Korea, Mexico, New Zealand, Norway, Great Britain, USA	Australia, Brazil**, Canada, Chile, Germany**, Hong Kong; China, Hungary, India, Italy, Japan, Malaysia,

[2] Report on the work carried out by the Committee for the Development of Competition and Protection of Consumer Rights during 2022. Available at: https://antimon.gov.uz/qomita-hisobotlari/

[3] OECD (2021), Competition Compliance Programmes, OECD Competition Committee Discussion Paper, http://oe.cd/ccp

		Netherlands, Peru, **Romania**, Singapore, Spain, Switzerland, United Kingdom, **United States**[4]
Non-credit granting states	Canada, France, Germany, To the European Union, Bulgaria, Romania, Russian Federation	Bulgaria, European Commission, Finland, **France,** Greece, **Korea, Mexico**, Netherlands, Sweden, Turkey

The organization's research shows that the raising tendency forward compliance programs in various geographic locations, particularly in Southeast Asian countries (ASEAN), Latin America, the European Union, and North America, offer fine reductions if the criteria specified in their guidelines are met and provides for the introduction of leniency programs.[5]

There are no international statistics on cases where compliance programs have resulted in fine reductions. While discounts under pre-existing leniency programs are available in principle, Spain, Canada and the US have not yet reported any court cases. But the situation is different in the European Union. In particular, in Italy, from 2015 to March 2021, in 18 antitrust investigations, the court provided a discount in 13 of them. Discounts ranged from 5% to 15%. In order to obtain such discounts, the seeker must report the violation to the Italian Competition Authority (AGCM) before an official investigation begins. [6] In Australia, however, courts consider existing compliance programs to be a relevant factor and have played a major role in considering sanctions in approximately 60 percent of cases since 2007.[7]

Let's have a look to the Japanese compliance system in the chart below:

Measures for Ensuring the Effectiveness of AMA Compliance[8]

For an AMA compliance program to be shared across a business and operated in a unified manner, they are necessary to document the contents of the program (unambiguity), and to make the documents easily accessible as necessary by comprehensively storing them on the enterprise's intranet or the like (accessibility). In light of the success cases and failure cases obtained through the survey, the following measures and points to keep in mind are deemed effective for ensuring the effectiveness of AMA compliance.

(1) Overall AMA Compliance Program

a. Commitment and Initiative of the Top Management

The most important element for ensuring the effectiveness of AMA compliance is that the top management of an enterprise expresses its commitment to and takes the initiative regarding AMA compliance. The following cases were seen among companies against which cease and desist orders and/or surcharge payment orders had been issued for conducts against the AMA in the past:

[4] **In bold**: Jurisdictions known to have changed their policy approach. United States has changed from 2011 to 2021, as it will consider charging credit in addition to sentencing credit in 2021.

[5] *Supra note* 3, p. 13.

[6] Italy commits to maximum reductions, 15% in case of an effective, pre existing programme that led to the detection and reporting of the infringement to the AGCM before proceedings were initiated; 10% in case of not manifestly inadequate programmes, even if they did not lead to detection and reporting; and 5% for both newly introduced programmes and manifestly inadequate programmes which are revised following the AGCM's intervention.

[7] Available at: https://www.lexology.com/library/detail.aspx?g=b092ec53-9966-469c-b584-8a63b004c1aa

[8] Survey on Corporate Compliance Efforts with the Antimonopoly Act (Summary). Japan Fair Trade Commission. November 28, 2012.

Cases where it was concluded that the failure to prevent a violation of the AMA or the failure to cease the violation at an early stage was attributed partly to insufficient transmission to employees of the clear policy of the top management that they should not implement business in a manner that would not be approved by society.

Cases where an enterprise subject to on-site inspection due to an alleged conducts against the AMA has issued a notice from the president seeking the cooperation of employees with an internal survey, and as a result, a conduct against the AMA related to another product was discovered and the enterprise was able to utilize the leniency program. To convey to employees the top management's emphasis on AMA compliance, it is important to send out a clear message repeatedly and directly.

b. Establishment of the AMA Compliance Program in Accordance with the Actual Situation

a) Risk Identification Concerning AMA Violations in Accordance with the Unique Situation of the Enterprise

Specific risks of individual companies concerning AMA violations differ significantly according to the business content, market environment, and other factors. As a result, if uniformly presented measures, such as those presented in the form of a model compliance program, are applied as they are, they will not be an effective AMA compliance program that are suitable for the unique situation of the enterprise. In fact, there is a case where an enterprise against which a cease and desist order and/or surcharge payment order was issued for its conducts against the AMA has found that the prevention of violations remains difficult as long as the same training is provided uniformly throughout the company. So the enterprise organizes its operating divisions into compliance groups according to the functions of the products they handle and business customs, and have the administrative department of each division play the central role in working on AMA compliance.

In establishing an effective AMA compliance program, it is important to focus on the enterprise's own risks related to the AMA and plan measures for addressing those particular risks.

When an enterprise intends to identify the risks it must handle, it will need to give comprehensive consideration to its internal factors, such as the business size, business content, and organizational climate, and external factors including the actual state of the industry, the market situation, and relevant legal systems.

The following cases serve as examples:

A case where an enterprise was able to use the leniency program, as it undertook internal investigations focusing on departments handling general-purpose products with the consideration that a cartel is more possible for such products and accordingly such departments are at high risks, and discovered a conduct against the AMA

A case where it was analyzed that a conduct against the AMA by a particular department had the grounds that the enterprise's legal and compliance department did not monitor the activities of the department in question sufficiently and that the same employees had belonged to the department for a long time, because the department was not deemed important within the company due to the amount of its sales

c. Establishment of Departments in Charge of the AMA Legal and Compliance and Implementation System

The questionnaire shows that almost all the subject enterprises have departments in charge of legal affairs and compliance matters. To ensure the effectiveness of measures concerning AMA compliance, a company needs to establish meticulous systems that will allow its legal and compliance department to promote AMA compliance effectively.

d. Integrated Approaches as a Group of Enterprises

In the recent business environment, with numerous cases of company splits, consolidated management, and globalization, we can say that the pursuit of AMA compliance by a single company is insufficient as a "tool for controlling and avoiding risks" or a "tool for maintaining and improving corporate value."

Competition authorities in each country and region have been cooperating in the detection of international cartels and other violations. Japan's leniency program can now be utilized jointly by multiple companies belonging to the same corporate group. In this way, integrated approaches to AMA compliance made by an entire group of enterprises, which include overseas business activities, have been becoming more important.

The following are cases of integrated approaches made by corporate groups:

・A case where the legal and compliance department of the head office is involved in and provides support for the training and audits of subsidiaries, etc.

・A case where no legal and compliance departments are established within subsidiaries intentionally, and instead the legal and compliance department of the head office promotes the AMA compliance of subsidiaries

・A case where whistleblowing reports are accepted and handled centrally at the head office.

The information shows how the compliance system has been implemented in the world experience. In conclusion, many countries emphasize that the compliance system plays an important role in corporate governance and compliance with competition law. Also, companies try to find solutions to potential problems, having the opportunity to eliminate risks in advance by implementing the system. As a result, it is a win-win relationship.

Is the system actually effective?

If you look at the order of organization of the system, it can be seen that the internal order of the system is fully subordinated to the head of the organization or enterprise for the organization and management of rules. This causes many doubts about the effectiveness of the system. The Resolution establishes such a procedure that an authorized person or unit is determined to be subject to and accountable to direct on the head of the state administration body, the regional and district governors of the state administration bodies of the Republic of Karakalpakstan, Tashkent city, and region, regional and district governors of local executive authorities, the executive body of an economic entity, or the supervisory board (if any). On the one hand, it is argued that such dependence and accountability ensures corporate unity and integrity, on the other hand, there is an argument that the limitation of the freedom of activity of the authorized person or the authorized unit can ultimately pose a great concern to the efficiency of the compliance system.

Here, if we pay attention to the role of the Competition Development Committee in terms of performance evaluation, it can be seen that according to the Decision, the Committee is empowered to evaluate the results of the performance of the main performance indicators of the antimonopoly compliance system. This is certainly useful for efficiency, but there is no clear measure to ensure that internal reports on these performance indicators are controlled by the head of the organization and that there are no subjective interests. Therefore, questions arise as to "whether a compliance system without an independent internal and external control and accountability system can actually be effective?". By ensuring corporate autonomy, the success of the systems will be more credible.[9]

[9] Anvarovich, Saidov Ibrokhim. "Corporate social responsibility under the UK Corporate Governance system." Eurasian Research Bulletin 21 (2023): 120-125.

Also, ensuring not only institutional independence but also financial autonomy plays an important role in the effectiveness of the system. In the current situation, the compliance officer or the relevant department is dependent on the organization for funding. This can be seen as a greater concern for efficiency of the system. The fact that the activity of the authorized person or the relevant department is directly dependent on the manager, the fact of dependency in a certain sense limits the independence of control and freedom of activity. In the end, there is a risk that the effectiveness of the system will depend on subjective factors.

I visited the official websites of several bodies, organizations and enterprises in order to check the extent to which this system has been established and the compliance system has been implemented in the system of bodies, organizations and enterprises as stipulated by law. I have mainly paid attention Appendix 5 of the Regulation system is set to introduce anti-monopoly compliance in 2021-2024 for business entities with a dominant position in the goods or financial market, as well as corporate customers whose average annual revenue from the sale of goods exceeds 30 billion soums in the last three years. I could find some positive changes in the system of the listed companies, including "Uztransgaz"[10] Joint Stock Company, "Navoiazot" [11] Joint Stock Company, and "UzAuto Motors" [12] Joint Stock Company, while some other companies listed in the Resolution have not established the system yet. Definitely, it is clear that a compliance system will be established in the system of these enterprises within the specified period, but it would be pro-competitive for the economy if these organizations, due to the size of their market share and contribution, would switch to the system sooner.

In Uzbekistan, however, the competition policy provides control not only of the actions of economic entities, but also of the actions of state bodies and local executive authorities. We often witness anti-competitive actions by state bodies and local governments, which do not comply with competition policy, but according to the relevant decree of the President, in order to prevent such actions, a compliance system will be introduced in the system of these bodies from January 1, 2021.[13]

In this regard, the report of the Competition Committee on the activities carried out in 2022 provides information about the introduction of the antimonopoly compliance system in 33 local executive authorities and 22 state administrative bodies. I have visited several local executive authorities with regionally developed economies, however, I found out that there are no reports on the official websites regarding the introduction of a compliance system or reports of specific compliance measures. The non-disclosure of statistical facts may be due to the fact that they were cited in internal audit control documents, or that the system of these bodies has not yet included the system in the implementation program. It would be expedient for such an inquiry to be reflected in a separate article.

Conclusion

I admit that it is difficult to create a perfect and effective compliance system in a night, especially in a country that still has little experience in this field. However, it is an obvious fact that the consideration of the factors that contribute to the improvement of the efficiency of the system requires only political and economic will. Therefore, I think we need consider that economically developed countries have proven fair competition is the driver of the economy, and the role of compliance in this field is important. This certain experience, thus, encourages states like Uzbekistan to regard and step forward toward a more perfect compliance system.

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[12] Available at: https://uzautomotors.com/companies/compliance

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